



February 16, 1999

Mr. J. Steven Houston  
City Attorney  
City of Alpine  
309 W. Sul Ross Ave.  
Alpine, Texas 79830

99-0511

Dear Mr. Houston:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123687.

The City of Alpine (the "city") received a request for the following information:

- 1) Letter(s) from Ray Spear to Alpine City Council Members after the appeals process.
- 2) Letter or other form of written communication from Council Member Frank Yakabanski to other City Council Members[.]
- 3) Letter(s) or Complaint(s) involving Alpine Police Chief Russell Scown since Ray Spear's termination from the force.

You contend that information responsive to item 1 is excepted from disclosure pursuant to section 552.103 of the Government Code. Because you do not assert an exception for requested items 2 and 3, you must release the responsive information for the latter two requested items. Gov't Code § 552.301.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that

(1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>1</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that a potential opposing party hires an attorney who makes a request for information establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

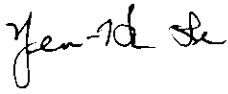
We have reviewed your arguments and conclude that you have shown that the city reasonably anticipates litigation and that the submitted information relates to the anticipated litigation. However, information that has either been obtained from or provided to the opposing party in the anticipated litigation through discovery or otherwise is not excepted from disclosure under section 552.103(a), and it must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). The submitted letters were obtained from the opposing party in the anticipated litigation. Therefore, you may not withhold the submitted information under section 552.103; the information must be disclosed.

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<sup>1</sup> In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in cursive script, appearing to read "Yen-Ha Le".

Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/nc

Ref: ID# 123687

Enclosures: Submitted documents

cc: Ms. Mindy Nelson  
Alpine Avalanche  
P.O. Box 719  
Alpine, Texas 79831  
(w/o enclosures)